Office-Supreme Court, U.S.
FILED
FEB 27 1985
ALEXANDER L. STEVAS,
CLERK

No. 83-2032

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner

v.

BERNARDO RIOS-PINEDA
AND
ESTARNILADA RIOS-PINEDA DE RIOS,
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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I. STATEMENT OF THE CASE

A. Factual Background

A deportation hearing was held on December 12, 1978 in Omaha, Nebraska in which the Respondents appeared before Immigration Judge Jessie M. Sellers. Most of the facts of record are gleaned from the 31 page transcript of that proceeding. (Pet. App. 80a-111a).

The Immigration Service on October 24, 1978 had initiated deportation proceedings against the Respondents by the issuance of an Order to Show Cause and Notice of Hearing. (Pet. App. 112a). This document alleged that the Respondents were not citizens of the United States, were natives and citizens of Mexico, and had illegally entered the United States on or about May 1, 1974. Counsel for the Respondents admitted these factual allegations. (Pet. App. 85a-86a).

Respondent, Bernardo Rios-Pineda, entered the United States for the first time in 1972. There is no clear statement as to when during that year this Respondent entered the United States. (Pet. App. 88a; 93a). Thereafter, he departed the United States for approximately two months during the year 1974. (Pet. App. 88a). Again, the precise circumstances of his departure are unclear. However, it is apparent that the Respondent was arrested by agents of the Immigration and Naturalization Service and that he departed the United States. Further, he was not provided a hearing before an Immigration Judge. (Pet. App. 88a-89a).

Thereafter, both Respondents entered the United States in May of 1974, paying a smuggler to assist them, $225.00 each. (id. at 96a).

At the time of the deportation hearing the Respondents had one United States citizen child and Respondent, Estarnilada Rios-Pineda de Rios, (herein after referred to as the "female respondent") was near to delivering a second United States citizen child. The male Respondent was em-

ployed and the Respondents were purchasing a home. Neither Respondent had a criminal record. (Pet. App. 76a).

B. History of the Case

At the deportation hearing on December 12, 1978 the attorney for the Respondents attempted to apply for suspension of deportation, though no formal applications were submitted. He also argued that the deportation of the Respondents would be unconstitutional in light of their United States citizen child. Counsel further argued that issuance of the Order to Show Cause was an abuse of discretion in light of a pending application for an alien labor certification, and lastly he applied for voluntary departure on behalf of the Respondents. All of the requested relief was denied. (Pet. App. 72a-79a).

Counsel for the Respondents then filed a timely appeal on December 20, 1978 to the Board of Immigration Appeals. Among the arguments made was that deportation of the Respondents would effect a "*de facto* deportation" of their citizen child. A brief was submitted to the Board of Immigration Appeals (Pet. App. 69a-70a). The Board of Immigration Appeals on May 30, 1980 dismissed the appeal rejecting the *de facto* deportation argument. The Board also rejected all of Respondents' other arguments. There was no discussion of the denial of voluntary departure. (Pet. App. 64a-68a).

The Respondents then filed a Petition for Review with the United State Court of Appeals for the Eighth Circuit. The Court in March of 1982 reversed and remanded for further proceedings, *Rios-Pineda v. INS*, 673 F.2d 225. The Court did not rule on any of the arguments made by the Respondents, except to note that the seven years required for suspension of deportation were undisputably met at that time.

The precise nature of the proceedings contemplated by the Court of Appeals was unclear. The Court quoted from *Vargas-Gonzalez v. INS*, 647 F.2d 457, 459 (5th Cir. 1981)

to the effect that a "*prima facie*" case entitling the Respondents to reopening upon the presentation of a proper procedural motion was appropriate. The Court further noted that the Respondents had made a substantial showing that they should be afforded relief on the basis of the evidence submitted. *Rios-Pineda*, at 227. However, the Court then remanded the case to the Board to permit the Respondents to submit a proper Motion to Reopen within a 60 day period and instructed the Board to rule upon the claim that they were entitled to suspension of deportation. *Rios-Pineda*, at 228. The Court plainly contemplated that a Motion to Reopen would be filed and that it would have to be carefully considered by the Board of Immigration Appeals. *Rios-Pineda*, at 228 n4 and n5.

On remand to the Board of Immigration Appeals the Board once again denied all relief. The Board ruled on July 16, 1982 and gave three basis for its decision. (Pet. App. 11a-15a). First, the Board held that the Respondents had not properly filed a motion within the sixty days provided by the Court of Appeals. The Respondents had mistakenly filed the motion with the Appellate Trial Counsel of the Immigration Service, rather than with the District Director in Omaha, Nebraska.

Secondly, the Board found that the Respondents did not set forth in their motion and supporting documents a *prima facie* case that would merit reopening and which would permit an application for suspension of deportation pursuant to §244(a)(1) of the Immigration and Nationality Act. The Court found that the Respondents did not establish a *prima facie* case of extreme hardship.

Lastly, the Board stated that in any event it would deny as a matter of discretion because it found that the appeals taken by the Respondents were "frivolous". The Board found that where eligibility for relief was gained by frivolous appeals or other dilatory actions that it would deny a Motion to Reopen as a matter of discretion. The Court also considered that the Respondents had used a paid smuggler and had failed to depart after being given voluntary depar-

ture by the Immigration Service, and the male Respondent having returned to the United States two months after having departed.

The Respondents then filed a second Petition for Review to the United States Court of Appeals for the Eighth Circuit. Once again, that Court reversed and remanded. See *Rios-Pineda v. INS*, 720 F.2d 529 (1983). The Court first found that the Motion to Reopen was properly filed and that the procedural error of counsel would not be given conclusive effect. *Rios-Pineda*, at 532.

The Court next found that the Board's denial of the Motion to Reopen for want of a *prima facie* showing of extreme hardship was in error. The Court noted that its normal standard for review of the Board's finding regarding a *prima facie* case of extreme hardship was an "abuse of discretion standard", citing this Court's decision in *INS v. Wang*, 450 US 139, 143, 144-145 (1981). The Court then went on to apply the "law of the case" doctrine. The Court interpreted its prior decision as requiring reopening. The Court further found that its prior decision was not "clearly erroneous" and hence was within the law of the case doctrine. *Rios-Pineda*, at 532-533. In any event, the Court found that the Board's denial for lack of extreme hardship was an abuse of discretion. *Rios-Pineda*, at 533 n3.

Lastly, the Court found the Board's denial as a matter of discretion to be in error. The Court assumed that the Board had the power to deny a Motion to Reopen to apply for suspension of deportation, even where a *prima facie* case had been established, in the exercise of its discretion. *Rios-Pineda*, at 534. The Court found that it could not accept the reasons given by the Board for its discretionary denial.

First, the Court rejected the Board's finding that the seven year period had accrued by the filing of "frivolous appeals". The Court found that a discretionary denial based upon abusive litigation could, under proper circumstances, form the basis of a denial of a Motion to Reopen, citing *LeBlanc v. INS*, 715 F.2d 685, 693 (1st Cir. 1983). The

Court then found that the petitions filed had not been frivolous. The Court noted that the petitions had resulted in the necessity of further proceedings.

The Court next rejected the Board's reliance on the use of a paid smuggler to deny the motion as "arbitrary, irrational, and contrary to the law", citing *Batoon v. INS*, 707 F.2d 399, 401 (9th Cir. 1983). The Court noted that disregard of the immigration laws in some form was essential to deportation proceedings. The Court therefore remanded to the Board with directions that it reopen the deportation proceedings for a full hearing before an Immigration Judge in order to determine whether suspension of deportation was merited.

The Solicitor General then petitioned this Court for a Writ of Certiorari which Writ has been granted. The Petition requested review only of the Court of Appeals reversal of the Board of Immigration Appeals denial as a matter of discretion. The propriety of the filing of the Motion and whether a *prima facie* case of extreme hardship existed were expressly not the subject of the Solicitor General's petition. Petition for Certiorari, pages 18-19 n14.

II. SUMMARY OF ARGUMENT

A. The Board of Immigration Appeals does have authority to deny motions to reopen to apply for suspension of deportation as a matter of discretion in proper cases.

Both abuse of the judicial and administrative system and disregard for the immigration laws under proper circumstances can form the basis of a proper denial by the Board of Immigration Appeals of such a Motion to Reopen. Neither the appeals taken by the Respondents, nor their "disregard" of the immigration laws justifies denial of their Motion as a matter of discretion.

B. The applicable regulations, 8 CFR §3.2 and 3.2, as well as §244(a)(1) of the Immigration and Nationality Act, grant broad discretion to the Attorney General and his del-

egates to deny motions to reopen to apply for Suspension of Deportation. However, this discretion is not unfettered.

The Board of Immigration Appeals can deny a Motion to Reopen to apply for suspension of deportation where it is apparent that the misconduct of the applicants will preclude their receiving the underlying relief requested. The Board's authority to pretermit further proceedings wherein the applicant presents an otherwise *prima facie* case for relief is limited to clear cases of misconduct which misconduct clearly outweighs any favorable facts apparent from the record. It is inappropriate for the Board to pretermit further consideration of a suspension application, absent such clear misconduct, as it is difficult to weigh the hardship that would occur to the American citizen children at this preliminary stage. The Board of Immigration Appeals is not free to arbitrarily pick and chose those Motions which it will reopen without rational basis.

C. The Court of Appeals applied the correct standard of review, that of "abuse of discretion."

This standard of review was correctly applied to the facts of this case and the Court of Appeals did not substitute its views for that of the administrative agency. The Court of Appeals did not improperly intrude on the prerogatives of the executive branch.

D. The litigation of the deportation proceedings including the appeal to the Board of Immigration Appeals and two Petitions for Review was not an abuse of the judicial process.

The litigation was not conducted in bad faith or utterly without a reasonable basis. The arguments advanced by the Respondents were not so clearly foreclosed as to amount to frivolous litigation.

The Court of Appeals correctly found that the Board's decision was contrary to law within the meaning of the abuse of discretion standard in that it relied upon factors not present in this record. The Court of Appeals correctly found that no abuse of judicial process had occurred.

E. The Court of Appeals correctly found that the Board of Immigration Appeals had abused its discretion insofar as it considered the Respondents' "disregard of the immigration laws" as a factor in denying the motion to reopen.

The Board of Immigration Appeals did not articulate any rational basis upon which to distinguish the actions of the Respondents from any other alien in deportation proceedings. Hence, the Government's argument that the Board of Immigration Appeals could distinguish between aliens in deportation based upon their degree of misconduct is misplaced.

III. ARGUMENT

A. The Board of Immigration Appeals has Authority to Deny Motions to Reopen to Apply for Suspension of Deportation in Proper Cases.

The Government petitioned this Court for certiorari to resolve one question. The question posed was whether the Attorney General and his delegates possessed discretion to deny a Motion to Reopen deportation proceedings for the purpose of seeking suspension of deportation under 8 USC §1254(a)(1) where it is alleged that the requisite seven years "continuous physical presence" was obtained by filing "frivolous appeals" and that the alien had in other ways exhibited disregard for the immigration laws. The United States Court of Appeals for the Eighth Circuit answered both parts of the posed question in the affirmative.

The Court of Appeals declined to follow Ninth Circuit precedent and find that the Board lacked authority to deny a Motion to Reopen to apply for suspension of deportation once a *prima facie* case of eligibility has been established. *Rios Pineda v. U.S. Dept. of Justice, INS*, 720 F.2d 529, 533 (1983). The Court assumed that cases from the First Circuit and statements from this Court's decision in *INS v. Wang*, 450 US 139, 143 and 145, were to be applied and

that the Board could deny the alien's Motion to Reopen "in the exercise of discretion." *Rios Pineda*, at 534.

The Court of Appeals further conceded, "While in some cases an abuse of judicial processes might be a factor relevant to a discretionary refusal to reopen deportation proceedings, (citation omitted), the appeals and petitions for review in this case do not fall into the 'frivolous' category." *Rios-Pineda*, at 534.

Lastly, the Court did not categorically reject the "disregard" of the immigration laws as a proper factor to support a denial of a Motion to Reopen as a matter of discretion. The Court found that the "disregard" in this case was of a kind necessarily present in most deportation proceedings and that the Board's reliance on that factor was "arbitrary, irrational, and contrary to the law." (Citation omitted) *Rios-Pineda*, at 534.

It is important to note at the outset that the Court of Appeals did not disagree with the answer suggested to the question posed in the Certiorari Petition by the Solicitor General. The rhetoric contained in the Government's Brief would lead one to believe that the Court of Appeals had acted in a manner completely at odds with its view of the proper application of the immigration laws. Such is not an accurate preception. This case involves a narrow issue regarding the *application* of legal precepts to a particular set of facts.

Like the Court of Appeals, the Respondents concede that the Board of Immigration Appeals has authority to deny a Motion to Reopen as a matter of discretion in a proper case both because the seven years of continuous physical presence were obtained as a result of appeals that amounted to an abuse of the judicial and/or regulatory process and/or the record contained unequivocal evidence of disregard of our immigration laws to such an extent as to clearly outweigh any favorable factors and favorable inferrences that are apparent from the record.

As will be developed *infra*, the Respondents will set forth their detailed disagreement with the Government re-

garding the nature of the discretion to be exercised by the Board as well as the application of the legal precepts to the facts of this case.

The Respondents will first consider the statutory and regulatory frameword of the Immigration and Nationality Act and Regulations as applied to this case. The Respondents will next consider the appropriate scope of appellate review. Lastly, the Respondents will address whether the Respondents' Motion to Reopen was properly denied in the exercise of the Board's discretion based on "frivolous appeals" and "disregard" of the immigration laws.

B. Statutory and Regulatory Framework.

Suspension of deportation is a remedy provided by section 244(a)(1) of the Immigration and Nationality Act, 8 USC §1254(a)(1). The remedy is available for persons having seven years of continuous physical presence in the United States; see *INS v. Phinpathya, No. 82-981 (Jan. 10, 1984)*; persons who have been of good moral character for the required seven years; and persons who in the opinion of the Attorney General would suffer extreme hardship or their citizen or permanent resident spouses, children, or parents would suffer extreme hardship.

The statutory eligibility requirements are prefaced by a grant to the Attorney General to determine "in his discretion" whether to suspend deportation and adjust the status of an alien to one lawfully admitted for permanent residence. Thus, an alien claiming susupension of deportation must establish continous physical presence and good moral character as a matter of law. Further, he must convince the Attorney General in his discretion that he and/or designated family member(s) would suffer extreme hardship. Lastly, he must convince the Attorney General that he merits a favorable exercise of discretion. *See Bastidas v. INS*, 609 F.2d 101, 102-104 (3rd Cir., 1979).

Motions to Reopen deportation proceedings in general are governed by regulations of the Department of Justice found at 8 CFR §3.2 and §3.8

8 CFR §3.2 provides, *inter alia*, for a Motion to Reopen to be filed by a party affected by a decision. Motions,

> . . . shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former deportation hearing; nor shall any Motion to Reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him and an opportunity to apply therefore was afforded him at the former hearing unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing.

8 CFR §3.8 is essentially procedural. 8 CFR §3.8(a) requires Motions to Reopen to state the new facts to be proved and requires affidavits or other evidentiary material. See *INS v. Wang*, *supra*, at 143. §3.8(b) and (c) govern the distribution of Motion papers and subsection (d) governs rulings on the Motion

Reading the Government's Brief, one would assume that a great deal more is said in these provisions than is actually there. These provisions set forth a relatively simple and orderly procedure for the filing of Motions to Reopen. There is little of a substantive nature. 8 CFR §3.2 does require as a predicate to the opening of deportation proceedings that the evidence sought to be offered be material, not have been available and which could not have been discovered at the time of the former hearing. Further, the discretionary relief sought must not have been available and if available, such availability have been made known to the alien at the former hearing. As applied to this case, the only relevant requirements of the regulations are that the evidence submitted be material and that the availability of

the evidence have arisen subsequent to the deportation hearing on December 12, 1978.

Unlike its predecessor, these regulations do not grant to the Attorney General express discretion to deny Motions to Reopen. See *Arakas v. Zimmerman*, 200 F.2d 322, 323-324 n2 (3rd Cir. 1952), cited in *Matter of Reyes*, 18 I&N Dec. 249, 253 (BIA 1982). Even the Board itself considers its authority limited to its "sound discretion". *Matter of Reyes*, *supra*, at 353.

Were this Court writing on a clean slate, the Government's claim of broad discretion based upon these regulations would be in substantial doubt. Motions to Reopen are expressly not to be granted unless the requirements set forth above have been met. Given normal canons of construction, it may well have been inferred where these two requirements were met that Motions to Reopen should be granted. The use of the permissive word "may" appears in the first sentence and appears to modify only the Board's authority to reopen on its own Motion. The word may does not appear to apply to Motions submitted by "an affected party".

However, this Court has stated in *INS v. Wang*, 450 US 139, 143 and 145, that the regulations may be construed narrowly, as they are framed in the negative, to provide the Board with discretion to determine under what circumstances proceedings should be reopened, citing *Villena v. INS*, 622 F.2d 1352 (9th Cir. 1980) (en banc) (Wallace, J., dissenting), and quoting Judge Wallace regarding the broad scope of INS discretion with regard to Motion to Reopen.

Last term, in *INS v. Phinpathya*, No. 82-91 (Jan. 10, 1984) this Court stated, "Although Respondent has filed a Motion with BIA asking that her deportation proceeding be reopened, the granting of the Motion is entirely within BIA's discretion. See 8 CFR §3.2 (1983); *INS v. Wang*, 450 US 139, 143-144, 144 n5 (1981)." See Slip.Op. at p.5, n6. While neither of these statements is the holding in the case before the Court, each is a strong indication that the Board

possesses discretionary power over Motions to Reopen deportation proceedings. It is important to remember that the primary issue in *Wang* was whether the Court of Appeals had exceeded its authority in substituting its own judgement as to what constituted "extreme hardship" where that determination had been committed by the text of the statute to the Attorney General. The issue before the Court in *Phinpathya* was whether the "continuous physical presence" requirement had been met. The quote cited above arose in a context in which the Court was dealing with the Respondent's assertion that the case before the Court was moot. Neither statement of this Court was in the context of a holding regarding the nature of the Board's authority.

This Court's citation to Judge Wallace's dissent in *Villena* as well as the Court's own language reveal that the Government's claims for "unfettered" discretion is without foundation in this Court's recent decisions. In *Wang*, after finding the Court of Appeals for the 9th Circuit had committed an error in ignoring the text of 8 CRF §3.2 and §3.8 as to the form of evidence which must be submitted, this Court stated:

> By requiring such a hearing on such a Motion, the Court of Appeals circumvented this aspect of the regulation, which was obviously designed to permit the Board to select for hearing only those Motions reliably indicating the specific recent events that would render deportation a matter of extreme hardship for the alien or his children. (Footnote omitted) (Wang, at 143)

This quoted passage indicates the Court's concern that the Board's regulations be strictly adhered to so that the Board could easily identify those cases which met the requirements of the regulations. Further, footnote 5 which follows this passage refers to Judge Wallace's dissenting opinion in *Villena*. A reading of Judge Wallace's dissenting opinion reveals that his primary concern was that the 9th Circuit's decision would require the Board to reopen deportation proceedings for fruitless and wasteful hearings

before immigration judges. Judge Wallace was concerned that the Board need not reopen deportation proceedings where an alien made out a *prima facie* showing of statutory eligibility, but where the Board would deny the application in any event as a matter of discretion. Thus, even where an alien could demonstrate that he met the extreme hardship requirement, the Board could deny as a matter of discretion under its statutory authority under 8 USC 1254(a)(1), as there would be no point in granting the Motion to Reopen as the application would in any event be denied.

The Respondents do not question the soundness of Judge Wallace's observations. The Board ought not be required to grant a Motion to Reopen where the underlying substantive relief sought will not be granted as a matter of discretion. Cf *INS v. Bagamasbad*, 429 US 24 (1976). However, the Government goes much further and argues that the Board has authority to determine ad hoc and without standards whether an individual merits reopening independent of any statutory guidelines. Petitioner's Brief, 17-22. None of the cases cited by the Government supports the claim for "unfettered" ability to pick the motions that will be granted.

Since this Court's prior decisions indicate that the Board has broad authority to grant Motions to Reopen and since in any event the Board plainly has authority under the underlying statute to deny the discretionary relief as a matter of discretion, the Respondents do not question the authority of the Board to deny Motions to Reopen as a matter of discretion where suspension of deportation is sought even where a *prima facie* case is otherwise set forth. The use of the term "*prima facie* case" is somewhat misleading in this context. Part of the applicant's *prima facie* case is to demonstrate that he merits reopening as a matter of discretion pursuant to the underlying statute. Thus, where he has not demonstrated that he merits the relief sought as a matter of the Attorney General's discretion, then he has not set forth a *prima facie* case. Cf. *INS v. Bagamasbad, supra*.

The Respondents' disagreement with the Government is over the breadth of the Board's authority. In a case of an application for suspension of deportation, that authority under the regulations is coextensive with the authority under the statute itself. See *Shin v. INS*, 750 F.2d 122, 125 (D.C. Cir. 1984). Where the Board finds that substantial adverse factors exist in the record which plainly outweigh favorable factors, then no further proceedings are required as the moving party will not obtain the relief requested in any event. This makes further proceedings unnecessary for all of the parties.

It is important to note that at this preliminary stage it is sometimes difficult to rule upon a Motion to Reopen to apply for suspension of deportation. The degree of hardship to be weighed is difficult to ascertain. See *Reyes v. INS*, 673 F.2d 1087, 1090 (9th Cir. 1982) and *Luna v. INS*, 709 F.2d 126, 128 (1st Cir. 1983). The Board asserts that it has authority to deny Motions to Reopen for suspension of deportation based on discretionary factors. As noted above, the Respondents do not disagree with this position in the abstract. It is the application to the case at bar and to other cases with which the Respondents take issue. A Motion to Reopen is an inappropriate procedural stage in which to sift, and weigh facts. Where a case presents a fair issue of eligibility as a matter of discretion, and where it is difficult to ascertain the particular hardship that would be entailed, the Board should not be permitted to pretermit further proceedings. There are cases where it is plain that the Board will and should be permitted to pretermit further consideration. See *Matter of Reyes*, 18 I&N Dec. 249, 254 (BIA, 1982) where the alien attained the necessary seven years by absconding.

As the 1st Circuit Court of Appeals has noted in *Luna v. INS*, *supra*, it is difficult to ascertain the degree of hardship without a hearing. Where the alien's conduct does not plainly indicate that he will not be afforded the ultimate relief, pretermittion is not appropriate.

As will be developed *infra*, the case at bar is not a case where the alien's conduct so plainly demonstrates ineligibility for the underlying relief that the Board should be permitted to pretermit further proceedings, notwithstanding that the three statutory requirements have been met. It is important to note that the Government has not petitioned for certiorari regarding the Court of Appeal's finding that the extreme hardship requirement has been met. See Petition for Certiorari at pp. 18-19 n14. Thus, this Court is presented with a case in which the Respondents have established a *prima facie* case of seven years continuous physical presence, good moral character, and that their citizen children would suffer extreme hardship were they deported. The sole question posed is whether the Board may in its discretion, on these facts, pretermit further proceedings based upon their conduct.

The Government states that the Attorney General in considering the Respondents' Motion was to consider: 1) whether the new evidence warranted reopening the proceedings, 2) whether the statutory requirements for eligibility for suspension relief had been satisfied, and 3) whether that relief was likely to be granted. Petitioner's Brief at 12-13. This is analytically incorrect insofar as it purports to separate the consideration of the first factor from the third factor. Whether reopening is warranted may not be considered separately from whether the relief was likely to be granted, at least in the suspension context. Whether the Board abuses its discretion in denying a Motion to Reopen should be gauged by whether its decision is rational in light of the possibility of relief being obtained.

The government argues for an independent basis upon which to deny Motions separate and apart from the underlying relief sought. Other than the indications of such authority which it extrapolates from this Court's *Wang* and *Phinpathya* footnotes, the Government offers a paucity of authority for this proposition.

First, the government argues that because the Attorney General created the Motion to Reopen he should be afforded considerable deference to determine whether its requirements had been met. See Petitioner's Brief at pp. 17-18. The Government cites no history of the regulations or any other convincing authority for this proposition.

It is well established that once having created an entitlement, even where such entitlement was not otherwise required, governmental entities must then utilize fair procedures to determine who should receive the governmental benefit created. See *Wolff v. McDonnell*, 418 US 539, 557-558 (1974) and *Morrissey v. Brewer*, 408 US 471, 481 (1972). The Government is not free to arbitrarily pick and choose those whom it deems to not merit reopening without relation to the underlying relief sought. *Shin v. INS*, supra, at 125, 127.

This seeming nuance of interpretational disagreement is of significance. While the Board's claim of authority purports to be a balancing test, it is no such test at all. As applied by the Board, the principle of discretion permits a one-sided review of the record. Where the Board simply identifies what it considers to be significant negative factors, the Motion is denied. As interpreted by the Respondents in the suspension application context the duty of the Board is to review the record as a whole and to pretermit further proceedings only where it is plain that underlying relief cannot be granted, notwithstanding careful consideration of the favorable factors contained in the record. Cf. *Ramos v. INS*, 695 F.2d 181, 185-188 (5th Cir. 1983) and *Shin v. INS*, supra.

C. The Court of Appeals for the Eighth Circuit Applied the Correct Standard of Review.

The United States Court of Appeals considered the Board's discretionary denial on an "abuse of discretion standard". It is not disputed that this is the correct standard

of review. It is only the application of this standard to the facts of this case which is in conflict.

What constitutes an abuse of discretion is a matter often considered by this Court and other courts. Precise definition is difficult. See generally, Davis, 5 Administrative Law Treatise, Chapter 29.3. This Court in *Citizens to Preserve Overton Park v. Volpe*, 401 US 402 (1971), reviewed 5 USC §706(2)(A), of the Administrative Procedures Act, to ascertain the meaning of the terms "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law." *Citizens to Preserve Overton Park v. Volpe, supra*, at 416. This Court instructed that in reviewing a determination, inquiry is made as to whether the decision maker's ultimate choice involved a consideration of the relevant factors and whether there was a clear error of judgement. Among cases cited by the Court was the decision in *Wong Wing Hang, v. INS*, 360 F.2d 715, 719 (2nd Cir. 1966).

This Court instructs that the Court of Appeals is not empowered to substitute its judgement for that of the agency. See *Overton Park*, at 416. However, the decision must not be without rational explanation, inexplicably depart from established policy or rest on an inpermissible basis or on other considerations Congress could not have intended to be relevant, *Wang Hing Hang v. INS, supra*, at 719. (per Friendly, J.). Further, pursuant to the *Overton Park* decision, where a clear error in judgement has been made, a Court of Appeals is entitled to set aside the agency's decision.

The Court of Appeals herein found the Board's discretionary denial to be an abuse of discretion with regard to the alleged "frivolous appeals" as lacking in a legal basis. Simply put, the Court of Appeals did not find that the appeals taken were frivolous.

It is important to note at this point that a judgement as to whether appeals are frivolous is not within the agency's expertise. No particular deference is merited to an agency's judgement in this regard. The Courts are frequently called

upon to make such determinations and are the real experts in this type of decision making. Thus, applying well established principles of administrative law, less deference is due an administrative agency when making this type of determination than where it applies its peculiar expertise in a narrow area of law. See Davis, Administrative Law Treatise, Chapter 29.3, pp. 343-344.

Secondly, the Court of Appeals found an abuse of discretion with regard to the alleged disregard of the immigration laws. The Court of Appeals found that this type of disregard of the immigration laws was inherent in most deportation cases and thus found the Board's reasoning irrational or based upon considerations not intended by Congress. *Rios Pineda*, at 534.

The Court of Appeals expressly did not substitute its own judgement for that of the Board. The Court held that the Board had not satisfactorily explained why the Respondent's conduct was a particular abuse of the immigration laws not inherent in deportation proceedings. 8 USC §1254(a)(1) requires as a prerequisite to relief that an alien be "deportable".

The government states "The Court of Appeals committed serious error by failing to accord any geniune deference to the Board's exercise of its discretion.", Petitioner's Brief at 29. The Government cites no particular aspect of the Court of Appeal's decision to support this contention. A careful review of the text of the Court of Appeals decision reveals considerable deference to the Board. The Court of Appeals adhered to traditional guidelines for reviewing an agency action on an "abuse of discretion standard". The Court premised its consideration of the subject by citation to this Court's decision in *INS v. Wang, supra*, at 143 n5. Obviously, it was mindful of the limits upon its authority.

Singing its ode to discretion, the Government fails to point out with any precision what the Court of Appeals did that was beyond its authority. The Government merely argues that the Attorney General has "unfettered" authority to deny Motions. This argument is overblown and does not

correctly delineate the appropriate and traditional balance between the broad authority of an administrative agency and the appropriate role of a Court of Appeals in reviewing that agency's decision on an "abuse of discretion" standard. While the Court's authority is limited the Board's authority is not unlimited, hence meaningful review in the Courts continues to exist. See *Shin v. INS*, supra.

D. The Litigation of the Deportation Proceeding by Counsel for the Respondents was not an Abuse of the Judicial Process.

The Board and the Government argue that the course of litigation by Counsel for the Respondents was frivolous in conducting this litigation. The Board found and the Government argues that it then follows that the Respondents should be deprived of their opportunity to present their suspension application to an Immigration Judge and that they should be deported from the United States forthwith, notwithstanding any present merit in that application. Quite simply, this is an extraordinary sanction to be imposed.

As noted above, the Respondents concede that the sanction may be imposed in proper cases. However, it should be imposed carefully and only where justified.

Neither the Board nor the Government suggests a standard, other than their own subjective perception as to what constitutes frivolous litigation, or even why standards ought to be set at the "frivolous" level.

This Court has twice dealt with the analogous issue of when attorney's fees ought to be awarded to a prevailing defendant in Title VII litigation and in a 42 USC 1983 proceeding. In *Christiansburg Garment Company v. EEOC*, 434 US 412, 421-423 (1978), this Court considered when a prevailing defendant ought to be awarded attorney's fees under Title VII of the Civil Rights Act. The Court held that where litigation was unreasonable, meritless or vexatious, attorney's fees should be awarded. The Court found that

the term meritless should be understood to mean groundless and without foundation. The fact that a plaintiff had lost was not in and of itself sufficient to meet that standard. However, the term vexatious was to be understood as not requiring subjective bad faith.

The Court held that where the EEOC had proceeded on a question of first impression and whose contention was not frivolous, attorney's fees would not be awarded.

Two years later in *Hughes v. Rowe*, 449 US 5 (1980), in a *per curiam* decision, this Court reversed a Court of Appeals that had awarded a $400 attorney's fee against a prisoner proceeding *pro se* pursuant to 42 USC §1983. This Court interpreted 42 USC §1988 to award fees only where the *Christiansburg* standard had been met. This Court then reviewed the plaintiff's contentions and found that at least one of the issues raised merited further consideration and, hence, vacated the award of attorney's fees. This Court noted that where even the Court of Appeals, in rejecting the plaintiff's claims had issued a seven page opinion giving detailed treatment to the plaintiff's claim, that this was a strong indication that it was not frivolous litigation.

It is well settled that deportation proceedings are civil in nature. However, it is equally well settled that deportation proceedings are of such import to the alien that an increased burden of proof over that normally utilized in civil cases is warranted. See *Woodby v. INS, 385 US 276 (1966)*. Thus, an attorney's role in a deportation case may analogized in certain respects to criminal counsel. Counsel may legitimately consider himself bound to raise every arguable issue on behalf of his client. Because one or more of these arguments is found to be lacking in merit does not make litigation as a whole meritless.

The Government in its brief follows the lead of the Board in pointing to certain aspects of the litigation finding them meritless. Petitioner's Brief at 23-27.

It is submitted that the litigation as a whole was not utterly without a reasonable basis.

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Before considering the details of the litigation below, the Respondents believe that the applicable standard should be at minimum the *Christiansburg* standard. The Board and the Courts should not be quick to infer an abuse of the judicial process by the rejection of the ultimate relief requested. The standard is whether the litigation as a whole is so lacking in merit as to present conclusive evidence of bad faith or have been so recklessly litigated as to be meritless in the *Christiansburg* sense. It is important to note that the correct analysis is that utilized by this Court in *Hughes v. Rowe* in focusing on whether any of the issues raised merited review.

The Respondents' primary contention before the Immigration Judge, the Board and the Court of Appeals on the first petition was that the deportation of the Respondents would effect a "*de facto* deportation" of the citizen child. The Government contends that this position was utterly foreclosed at the time that it was raised. A careful review of the decisions rendered at that time do not support the Government's position.

First, this litigation took place within the jurisdiction of the United States Court of Appeals for the Eighth Circuit. In *Mendez v. Major*, 340 F.2d 128, 131 (8th Cir. 1965), that Court rejected a claim that aliens subject to the two-year foreign residence requirement of §212(e), 8 USC 1182(e), must be afforded a waiver of that requirement wherein they had a United States citizen child. This decision arose in the context of an application by aliens subject to the two-year residence requirement as exchange aliens pursuant to §101(a)(15)(J), 8 USC 1101(a)(15)(J), and §212(e) of the Immigration and Nationality Act. Such aliens entered the United States with the knowledge that they were required to depart at the conclusion of their visa. The Court of Appeals decision relied expressly on Congressional power to determine conditions underwhich aliens may enter or remain in the United States. The Court relied for authority upon cases dealing with that authority. See *Mendez v. Major*, supra at 131-132.

The *Mendez* decision was not binding upon the Respondents. It simply did not raise the issue of *de facto* deportation of U.S. citizen children. The Respondents case arose in deportation proceedings. Their contention was to be considered in a different procedural and substantive context.

The Respondents argued that their child and later children were sufficiently assimilated into American life that deprivation of this status would be unconstitutional. This argument differs from that offered in the §212(e) context wherein the aliens themselves entered knowing that they must depart within a set time frame. The Respondents' claim was not definitively rejected in the Eighth Circuit until *Valadez-Salas v. INS*, 721 F.2d 251, 252 (8th Cir. 1983).

Moreover, one District Court had accepted the Respondents' argument subsequent to the Eighth Circuit decision. See *Acosta v. Gaffney*, 413 F. Supp. 827 (D.N.J., 1976), reversed at 558 F.2d 1153 (3rd Cir. 1977). Although ultimately reversed, Judge Stern's opinion was a forceful argument for the proposition asserted by the Respondents. The District Court relied upon its reading of at least one Circuit's authority for the proposition that a *de facto* deportation would be unconstitutional.

The Court of Appeals noted that the Supreme Court had never directly spoken on this issue, *Acosta v. Gaffney*, *supra*, at 1158 n5. However, it agreed with other Circuits which had rejected the claim.

The Respondents do not herein argue that this Court should affirm based upon the *de facto* deportation argument. What they do argue is that the raising of this issue was not foreclosed by precedent and was not frivolous. A noted United States District Court Judge had agreed with the Respondents' position. The fact that it was later reversed by a Court of Appeals does not render that Judge's decision frivolous. Likewise, the Respondents' contention does not become frivolous simply because a number of Courts' have rejected it.

In *Teamsters v. United States*, 431 U.S. 324 (1977), this Court construed §703(h) of Title VII in a manner that overruled at least six United States Courts of Appeals and decisions in at least 30 cases. There had not been a dissenting opinion in any of those decisions. See *Teamsters v. United States, supra*, at 378-379, n2, (Marshall dissenting.). Nevertheless, this Court found merit in the Petitioner's arguments. Simply because a number of Courts have ruled to the contrary does not make the argument frivolous.

Utilizing the analytical framework of *Hughes v. Rowe*, *supra*, should one of the issues raised by the Repondents have been meritorious, then it may not be said that the appeals were frivolous. As outlined above, it is submitted that the "*de facto* deportation" issue, though not ultimately of sufficient merit to permit the Respondents to prevail was not frivolous or an abuse of judicial process. It is unnecessary for the Respondents to justify each and every claim raised below. These claims did not serve to prolong the litigation, nor did they multiply its complexity. Hence, they are essentially irrelevant.

The essential thrust of the Government's brief is that the Court of Appeals has encouraged frivolous and dilatory tactics by their method of review of the Board's determination that the Respondents had filed frivolous appeals. The Court of Appeals merely noted that as a result of the two petitions for review, further proceedings had been found to be necessary. *Rios Pineda*, at 534. While it is certainly true that more extensive discussion from the Court of Appeals would have been helpful, it is not apparent that the Court of Appeals would take this view in subsequent cases.

The Court stated:

> While in some cases an abuse of judicial processes might be a factor relevant to a discretionary refusal to reopen deportation proceedings, see *LeBlanc v. INS*, *supra*, 715 F.2d at 693, the appeals and petitions for review in this case do not fall into the "frivolous" category. Indeed, this Court has now twice considered

> petitions, which regardless of their ultimate success, have required further proceedings to fully and fairly decide the petitioner's claim of their right to stay in this country. *Rios Pineda*, at 534.

The Government focuses entirely upon the second sentence and ignores the first sentence. It is apparent that the Court of Appeals did consider whether the petitions filed were themselves frivolous separate and apart from the further proceedings that the passage of time necessitated. The Court expressly cited *LeBlanc v. INS*, *supra*, and did note that the Board could deny based on frivolous appeals in an appropriate case.

In *LeBlanc v. INS*, the First Circuit held that the Board had the power to deny a Motion to Reopen to assert a suspension claim as a matter of discretion. The Court went on to review the Board's decision on an abuse of discretion standard, citing *Balani v. INS*, 669 F.2d 1157, 1160 (6th Cir. 1982). See *LeBlanc v. INS*, *Supra* at 693. The Court went on to uphold as rational the Board's reliance on the factor of frivolous appeals and dilatory tactics. In that case, Petitioners argued that their delaying tactics were themselves favorable considerations. See also *Lam Chuen Ching v. INS*, 467 F.2d 644, 645 (3rd Cir. 1972).

There is no inconsistency between the decision of Court of Appeals herein and the decision of the First Circuit. The Court of Appeals for the Eighth Circuit applied the same legal precept, that the Board could deny as a matter of discretion where the seven years were obtained by frivolous litigation.

Further, the Court reviewed by the same standard of review, "abuse of discretion". The explication of that standard by the Courts is nearly identical. Compare *Rios-Pineda*, at 534, and *LeBlanc v. INS* at 693. The Court in *Rios-Pineda* differed only in that it found the appeals that were taken were not frivolous.

While the standard of review of the Board's determination is that of an "abuse of discretion", less deference is

due the Board when its decision rests on essentially a judicial basis and not on factors within their particular expertise. This is especially true where the large part of the allegedly frivolous litigation took place before the Court of Appeals.

The government acknowledges that the Board does permit applications for suspension where the seven years were accrued during the pending of appeals. Petitioner's Brief at 33, n21. Thus, the Board does distinguish between cases where the seven years have accrued on a non-frivolous basis. The Board's decision is based upon its review of this record and does not involve a particular application of its expertise regarding the immigration laws.

The Government further argues in its Brief that the decision of the Court of Appeals rewards dilatory tactics. Petitioner's Brief at 30-33. Under the Court of Appeals analysis, the Board retains the discretion to deny Motions as a matter of discretion in abusive cases. The Court of Appeals will only step in where that discretion is abused.

In general, the Petitioner argues for unbridled discretion of the Board of Immigration Appeals. The Respondents do not quarrel with the need for the Board to retain flexibility and discretion in considering Motions to Reopen. A restrictive standard of review is appropriate and was in fact employed by the Court of Appeals herein.

The Government's argument in this case harkens back to a time when the Courts distinguished between rights and privileges. This argument has been long rejected in the due process area. See Tribe, American Constitutional Law, Sec. 10-8, pp 509-510 (1978). Simply because an alien does not have a right to have his deportation proceedings reopened, does not mean that he is not entitled to a fair and careful consideration of the Motion. Having held out a remedy, the Board may not dispense the remedy without a rational basis. *Shin v. INS*, supra.

The Government further argues that the seven year requirement of 8 USC §1254(a)(1) will become a nullity as a result of the Court of Appeal's decision. Petitioner's Brief

at 30-33. This argument is obviously overblown. The solution to this problem lies with the agency itself. See *Shin v. INS*, supra, at 130-131, (dissent). Although charged with being deportable in 1978, it was nearly two years later when the Board affirmed the orders of deportation. The Board itself failed to promptly dispose of these cases.

Moreover, as noted above, the Board retains the authority to deny Motions as a matter of discretion based upon an appropriate record of dilatory tactics.

The Respondents applied for voluntary departure pursuant to §244(e) of the Immigration and Nationality Act. The Immigration Judge denied this application. While neither the Respondents notice of appeal or brief raised this issue before the Board, the Board plainly had authority to consider it. See 8 CFR §3.1(c).

By denying voluntary departure, the Immigration Judge subjected the Respondents to the bar of §212(a)(17) of the Immigration and Nationality Act, which at the time of his decision, would have been a permanent bar to their return as permanent residents. The issue of voluntary departure was a close one and plainly merited appeal to the Board and into the Courts.

The Court of Appeals considered the issue of voluntary departure pursuant to 8 USC §1254(e) as properly before them. See *Rios-Pineda v. U.S. Dept. of Justice*, 673 F.2d 225, 226 (8th Cir. 1982). The Court did not address the issue because it remanded on other grounds. Certainly, the denial of voluntary departure posed a non-frivolous issue separate and apart from the grounds discussed above. This is particularly so wherein the Respondents had a possibility of immigrating to the United States based on the employment of the male Respondent. See §212(a)(14) and §203(a)(6) of the Immigration and Nationality Act, 8 USC 1182(a)(14) and 1153(a)(6).

In summary, taken as a whole, the appeals taken by the Respondents where not so frivolous as to amount to an abuse of the judicial or administrative process that merited the denial of their suspension application without reference

to its merits. The Board abused its discretion in denying the Motion wherein the petitions where not frivolous as a matter of law. Cf *Hughes v. Rowe*, supra.

E. The Court of Appeals did not Err in Finding an Abuse of Discretion wherein the Board of Immigration Appeals Denied the Motion Based upon Disregard of the Immigration Laws

The Board also relied upon the Respondents' use of a paid smuggler to help them avoid inspection, the male Respondents' return after a forced absence of only two months and the failure to depart voluntarily, in the denial of the Motion. (Petitioner's Appendix 13A-14A). It is not apparent whether this served as a independent basis separate and apart from the perceived lack of merit in the Respondents' appeals. More likely, these grounds appear to be cumulative factors in the Board's consideration. From a reading of the Board's opinion, it cannot be said that these basis would have independently led the Board to deny the Motion.

It is important to note that the Board merely mentions these factors. The precise nature of these events, and even the Board's formulation of them, are in grave question based upon this record.

The only fact that is clear is that the Respondents paid $450 to a smuggler to enter the United States. Whether that occurred in 1972 or 1974 is not clear from the record. See Brief for Respondent, supra at 1.

The nature of the circumstances under which the male Respondent departed the United States in 1974 are quite unclear. See *Brief for Respondents, supra* at *pg. 1*. Most puzzling, is the Board's statement that "prior to the male Respondent's departure, he had been granted administrative voluntary departure which was extended once and he nevertheless failed to depart voluntarily." (Pet. App. 13a.) If the Board is to be understood as utilizing the term "voluntary departure" in its technical and not normal usage, the statement is inexplicable. First, nothing in the record be-

fore this Court or before the Court of Appeals evidences the Board's statement of facts. It appears that the Board is relying on some information, probably contained in the Immigration Service file, which was not made of record in the deportation proceeding. Moreover, the male Respondent's departure could not be considered to be a deportation, as no judicial proceedings had ever been commenced. Further, the Government never charged either in deportation proceedings or in criminal proceedings that male Respondent re-entered the United States after having been deported.

Once again, the Respondents do not contest the Board's discretionary ability to deny a Motion to Reopen based upon "disregard of the immigration laws". In an appropriate case, disregard for the laws of the United States may well form an independent and compelling basis upon which to deny a Motion to Reopen. Once more, this is not such a case.

As the Court of Appeals noted, disregard of our immigration laws is necessarily present in some form in most, if not all, deportation proceedings. *Rios-Pineda*, at 534. The government argues in its Brief that the Board has the power to distinguish among deportable conduct to decide which merits the sanction of a preemptory denial of a Motion to Reopen. Brief for Petitioner at 37. Counsel for Respondent does not quarrel with this formulation. However, there is no indication in the Board's decision that it did so. As noted above, these factors appear to have been considered as cummulative factors that supplemented and re-enforced the Board's findings of the perceived lack of merit in the underlying litigation.

Nothing in the Board's decision distinguished the Respondents from "simple overstays". If the Board is going to make such determinations, it must do so expressly and with rational explanation. Cf. *Ramos v. INS*, supra, at 185-188.

It is indisputable that an alien must be "deportable" to apply for suspension of deportation. Such is a statutory prerequisite. Thus, it is incumbant upon the Board to distin-

guish the egregious offenders from the less offensive. Nothing in the Respondents' conduct identifies them as such egregious offenders.

The Government makes the astonishing argument that "just as a fugitive from justice is not entitled to pursue relief through the Courts, an illegal alien who remains in the country by evading valid orders to depart should not be entitled to discretionary administrative relief from deportation." Petitioner's Brief, at 37. This argument entirely overlooks the nature of the suspension of deportation remedy. The Government's position would be a *pro tanto* repeal of the suspension statute insofar as discretionary administrative relief is concerned.

The Government further argues as if the Respondents had been fugitives who had absconded to accure the necessary seven years. This is completely without factual basis in this record and if argued by analogy is simply inapt. Whether the Board can deny a Motion to Reopen where the alien's acquire seven years by absconding is not before the Court. For present purposes, Respondents can readily assume that such a denial would be proper. The disregard of the immigration laws discussed by the Board does not in any way relate to the argument advanced by the Government.

Once again, the Government alludes to a crushing administrative burden on the INS. See Petitioner's Brief, at 39. No support for this assertion is apparent from the record and none is suggested by the Petitioner. The Government appears to be arguing for the ability of the Board to deny Motions wholesale without consideration of the individual merits of each.

The cases cited by the Government are simply inapposite to the principle asserted. None of these cases support the argument made.

In summary, the Respondents accept the authority of the Board of Immigration Appeals to deny Motions to Reopen based upon egregious "disregard of the immigration laws". No such egregious disregard was found by the Board

as an independent basis of denying the Motion. Moreover, the Board utterly failed to distinguish the disregard present in this case from that present in any Motion to Reopen to apply for suspension of deportation.

IV. CONCLUSION

The Respondents respectfully request that this Court affirm the decision of the United States Court of Appeals and remand for further proceedings consistent with this Court's opinion and that of the U.S. Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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March 4, 1985